

1 Mary E. Bacon, Esq.
2 (NV Bar No. 12686)
3 SPENCER FANE LLP
4 300 S. Fourth Street, Suite 950
5 Las Vegas, NV 89101
6 Telephone: (702) 408-3400
7 Facsimile (702) 408-3401
8 Email: mbacon@spencerfane.com

9 *Attorneys for Defendants Bernard McPheely,*
10 *Karl Leaverton, Gerald McGuire and Lewis Smoak*

11 (Additional Counsel on Signature Page)

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14 THEODORUS STROUS, DERIVATIVELY
15 ON BEHALF OF SCIO DIAMOND
16 TECHNOLOGY CORP.,

17 Plaintiff,

18 v.

19 BERNARD MCPHEELY, KARL
20 LEAVERTON, GERALD MCGUIRE,
21 LEWIS SMOAK, ADAMAS ONE CORP. and
22 JOHN G. GRDINA,

23 Defendants,

24 and

25 SCIO DIAMOND TECHNOLOGY CORP.,

26 Nominal Defendant.

Case No. 22-cv-00256-JCM-EJY

27 **REPLY MEMORANDUM OF LAW IN**
28 **SUPPORT OF SCIO DEFENDANTS'**
MOTION TO DISMISS

Individual Defendants Bernard McPheely, Karl Leaverton, Gerald McGuire and Lewis Smoak (“Individual Defendants” and collectively with Scio, “Scio Defendants”) respectfully submit this Reply Brief in response to Plaintiff Theodorus Strous’s (“Plaintiff”) Opposition Brief and in support of their Motion to Dismiss (“Motion”).

INTRODUCTION

This action rises out of a shareholder’s dissatisfaction with an asset purchase agreement that was fully disclosed to all Scio Shareholders and approved by a quorum of Scio shareholders. Plaintiff’s Opposition Brief confirms Scio Defendants’ argument that Plaintiff fails to satisfy Federal Rules of Civil Procedure 12(b)(6) and 23.1 by reiterating the same deficiently pled facts in his Second Amended Complaint (“SAC”). The Opposition Brief is littered with factual falsehoods, misstatements and contradictions, demonstrating Plaintiff’s inability (or unwillingness) to review and analyze the incorporated Scio SEC filings.¹ Plaintiff’s Brief confirms that his claims related to the transaction are without basis and fail for three reasons.

First, Plaintiff fails to adequately plead demand futility, which is required for his derivative claims. Plaintiff wholly distorts the non-controlling Delaware case he primarily relies on with

¹As an example, Plaintiff alleges that “[t]he Asset Purchase Agreement itself has never been disclosed publicly or provided to Scio shareholders.” (ECF No. 36, Opposition Brief, at p. 3, hereinafter ECF No. 36 at ____). In fact, the Asset Purchase Agreement was made publicly available as Appendix A to Scio’s May 17, 2019, Definitive Proxy Statement, Schedule 14A. (See ECF No. 29-4, Sullivan Decl. Ex. D; see also ECF No. 29-7, Sullivan Decl. Ex G; see also ECF No. 29-8, Sullivan Decl. Ex. H). Plaintiff also alleges that Bruce Likly and Ben Wolkowitz “immediately resigned on February 7, 2019,” due to “[apparent concerns] with the serious implications to Scio’s shareholders resulting from the changes to the Asset Purchase Agreement and the Individual Defendants’ intentions...” (ECF No. 36 at 4-5). In reality, Mr. Wolkowitz resigned for health reasons (and has subsequently passed away) and Mr. Likly resigned for personal reasons, as disclosed in an 8-K filed on February 13, 2019. (See Sullivan Addendum Decl. Ex. I (Scio, Current Report (Form 8-K) (Feb. 13, 2019))). As outlined in the 8-K, both Mr. Wolkowitz and Mr. Likly were in “full support of the Board’s decisions and their resignations are not the result of any disagreement or conflict.” *Id.* Jonathan Pfohl’s resignation was announced in an 8-K filed on May 31, 2019, in which he was thanked for “his service through numerous transitions in business, most notably and most recently through the Asset Purchase Agreement with Adamas.” (See Sullivan Addendum Decl. Ex. J (Scio, Current Report (Form 8-K) (May 31, 2019))). Plaintiff also alleges that the May 17, 2019 Final Proxy Statement was the first time it was “revealed” that the four Scio Defendants had secured debt that would be satisfied per the terms of the Adamas transaction. (ECF No. 36 at 5). In fact, this was disclosed in February of 2019 in the PRE 14A that five directors and officers of the Company held \$165,000 of secured debt, and that they would receive “Payment in full of this debt from Adamas.” (ECF No. 29-3, Sullivan Decl. Ex. C, at 14). Additionally, the names of the five directors and officers, including the four Scio Defendants, were listed in the PRE 14A. (*Id.* at 19). The May 17, 2019, Final Proxy Statement provided the exact amounts of Add-On Notes obtained by each director. (ECF No. 29-4, Sullivan Decl. Ex D, at 34).

1 respect to demand futility, namely *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476–CS (Del.
2 Ch. Feb. 6, 2013) (*See* ECF No. 36-1, Muckleroy Decl., Ex. 1).

3 *Second*, even if Plaintiff's demand was adequate, none of the actions and inactions Plaintiff
4 alleges are sufficient to make out a claim for breach of fiduciary duty. Beside conclusory and
5 embroidered statements like “the Individual Defendants’ conduct is beyond the pale of bad faith,”
6 they participated in “contumacious conduct” and their “violations were egregious,” Plaintiff fails to
7 cite or identify any supporting facts or case law that Scio Defendants’ actions are a “product of fraud
8 or self-interest” or that the Scio Defendants “failed to exercise due care in reaching the decision” in
9 order to rebut the business judgment rule.

11 *Third*, Plaintiff himself demonstrates the SAC's shortcomings by making a last ditch—and
12 futile—effort to cure the deficiencies by requesting a stay to permit the appointment of a Scio
13 Receiver and to—yet again—amend his Complaint.

14 There is no reason for this litigation to move forward. Plaintiff's SAC should be dismissed
15 with prejudice under Rules 12(b)(6) and 23.1 of the Federal Rules of Civil Procedure because
16 Plaintiff fails to adequately plead—and altogether lacks a claim as a matter of law for—demand
17 futility, breach of fiduciary duty, and unjust enrichment.

19 ARGUMENT

20 I. Plaintiff wholly failed to establish that a Pre-Suit Demand was futile.

21 Where, as here, a plaintiff fails to make a pre-suit demand, Federal Rule of Civil Procedure
22 23.1(b)(3) directs the plaintiff to “state with particularity . . . the reasons for not obtaining the action
23 or not making the effort.” (emphasis added). In other words, Plaintiff must allege sufficient facts to
24 show a demand would have been futile. *Arduini v. Hart*, 774 F.3d 622, 628 (9th Cir. 2014). Plaintiff
25 failed to do so in his SAC, as well as in his Opposition Brief.

27 *First*, Plaintiff alleges for the first time in his Opposition Brief that a pre-suit demand was
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1 futile “as the Individual Defendants had secretly abandoned the company. . . .” (ECF No. 36 at 8.)
 2 But Plaintiff did not raise this allegation in his SAC as required by Rule 23.1(b). Moreover, Scio
 3 Defendants did not resign until March of 2020, well after the Adamas Transaction was finalized in
 4 October 17, 2019.² (ECF No. 29-6, Sullivan Decl. Ex. F, at 75). Plaintiff had approximately five
 5 months to make a pre-suit demand and failed to do so.

6 *Second*, Plaintiff argues in circular fashion that the Scio Defendants’ actions fail the first
 7 prong of *Aronson*—requiring that the directors are disinterested and independent—because the
 8 actions “were clearly self-interested, were illegal, and could not have been the product of any valid
 9 business judgment.” (ECF No. 36 at 9). In support of his circular reasoning, Plaintiff relies almost
 10 exclusively on Judge Strine’s oral order *In re Puda Coal, Inc. S’holders Litig.* (ECF No. 36 at 10-
 11 14; *See also* ECF No. 36-1, Muckleroy Decl., Ex. 1). But this reliance is wholly misplaced as *Puda*
 12 *Coal*—an unpublished Delaware case that does not interpret Nevada law—is neither controlling nor
 13 persuasive. Nor does *Puda Coal* stand for the proposition Plaintiff advances: that a bare description
 14 that directors are “clearly self-interested” or lacked independence is sufficient to meet the
 15 particularity pleading standard.

16 In *Puda Coal*, three of the remaining four directors resigned after concluding that company
 17 assets were “stolen out from under them,” by the fourth director, which left “the principal suspected
 18 wrongdoer in control of the company.” *Puda Coal*, C.A. No. 6476-CS, Tr. Op. at 4-6. Chancellor
 19 Strine described the wrongdoing by the remaining director (and another, already resigned director)
 20 as “the most extreme sort of fiduciary violation you could image.” *Id.* at 6, 10. Moreover, the
 21 defendant directors in *Puda Coal* “conclude[d] that what the plaintiffs are complaining about *they*
 22 *subjectively believe is true* . . . They leave the company under the sole dominion of a person [that
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 25

26
 27 ² Contrary to Plaintiff’s assertion otherwise, Scio Defendants did not “immediately” resign. (ECF
 28 No. 36 at 19.)

1 the defendants] *believe* has pervasively breached his fiduciary duty of loyalty.” *Id.* at 16 (emphasis
 2 added). Chancellor Strine chastised the *Puda Coal* defendants for bringing a motion under Rule 23.1
 3 and for claiming plaintiff’s demand would not have been futile where in actuality, what defendants
 4 did “*when they concluded there was wrongdoing* was not to bring suit but to quit and leave the
 5 company in control of a person that they believed had seriously breached his fiduciary duty of
 6 loyalty.” *Id.* at 16 (emphasis added).

7
 8 Here, unlike the allegations in *Puda Coal*, Plaintiff does not allege conduct to meet the
 9 heightened pleading requirements of Fed. R. Civ. P. 23.1. Unlike the “most extreme” conduct “you
 10 could image” in *Puda Coal*, which the court described as having assets “stolen out from under the
 11 company by a director, (*id.* at 4-5, 10), the alleged, innocuous conduct Plaintiff complains about
 12 amounts to the Scio Defendants failing to keep Plaintiff informed on a play-by-play basis after the
 13 Adamas Transaction shareholder vote. Not one allegation in the SAC rises to the level of rebutting
 14 the business judgment rule much less that the Scio Defendants had “knowledge of wrongdoing” in
 15 their lack of communication. (*See* ECF No. 28 at 16-21.) At best, the SAC alleges that the Scio
 16 Defendants were negligent in post-closing communications, which is insufficient to meet the
 17 heightened pleading standard in Rule 23.1. The conduct at issue in *Puda Coal* was described by the
 18 Court as having assets “stolen out from under” the company by a director, (*id.* at 4-5), whereas the
 19 conduct Plaintiff alleges is that the Scio Defendants failed to communicate beyond the required
 20 public disclosures. The attempted conflation of the Scio Defendants and the defendants in *Puda*
 21 *Coal*—to borrow a phrase from Plaintiff—“does not pass the straight-face test.” (ECF No. 36 at 17.)

22
 23
 24 *Third*, Plaintiff astonishingly alleges that the Scio Defendants’ alleged actions “are far more
 25 egregious than those in *Puda Coal*,” and goes on to list these ostensibly “egregious” actions, such
 26 as authorizing the Adamas Transaction (after shareholder approval), which resulted in repayment of
 27 the Scio Defendants’ individual loans to Scio and amending the terms of the Asset Purchase
 28

1 Agreement such that the Scio Defendants would “control and hold onto the 900,000 Adamas
 2 shares.” (ECF No. 36 at 12-13). Even more astonishingly, Plaintiff claims Scio Defendants did “all
 3 this without notice to Plaintiff and Scio’s shareholders.” (*Id.* at 13). But these false allegations are
 4 contradicted by *Plaintiff’s own pleadings* and publically-available SEC filings, as the repayment of
 5 the Scio Defendants’ loans and the amended terms of the Adamas Transaction were unequivocally
 6 disclosed to shareholders before the vote on the Adamas Transaction. (ECF No., 26, SAC ¶¶ 9, 47;
 7 ECF 36 at 4; *see also* ECF No. 29-3 at 14; ECF No. 29-4 at 5, 9, 10, 14, 34).

8
 9 Furthermore, Plaintiff grossly misstates and exaggerates the terms of the repayment of the
 10 individual loans. On May 17, 2019, Scio’s Final Proxy Statement disclosed that the four Scio
 11 Defendants held a total of \$160,000³ of secured debt that would be satisfied through the Adamas
 12 Transaction. (ECF No. 29-4 at 34). Yet, Plaintiff argues “the self-dealing aspect of the Adamas
 13 transaction that inured to the Individual’ Defendants’ personal benefit (\$3.3 million in cash to repay
 14 their own loans to Scio) while retaining ‘indefinite’ control of the Adamas shares to be distributed.”
 15 (ECF No. 36 at 24). This is an invented allegation that has no well-founded basis in fact and is
 16 contrary to evidentiary support.

17
 18 The remainder of the claims that Plaintiff argues excused a pre-suit demand, and which
 19 Plaintiff inaccurately describes as “far more egregious” than the admitted wrongdoing in *Puda*
 20 *Coal*,” include alleged actions by the Scio Defendants in failing to follow certain formalities of NRS
 21 § 78.175, settling an outstanding legal bill, paying a landlord for back rent, and resigning from Scio
 22 after the transaction was approved. (ECF No. 36 at 12-13). Despite the innocuous nature of these
 23 actions, even if true and which are entitled to the business judgment presumption, Plaintiff argues
 24 that the “obvious and reasonable inference” of these actions is an intent by the Scio Defendants to
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 27
 28 ³ An additional \$5,000 was held by Jonathan Pfohl. (ECF No. 29-4 at 34.)

1 “strip Scio of its assets, conceal their actions from Scio’s shareholders, and then abandon the
2 company to try to avoid liability.” (*Id.* at 13). If this were so, Plaintiff would not need to rely on
3 invented allegations based in untruths and contradictions.⁴

4 In contrast to the misleading, incomplete, or plainly false claims by Plaintiff, it is his silence
5 on certain key issues that is the most revealing. While claiming that the vote “purportedly took
6 place” in August, “without shareholder knowledge,” and that the vote was “purportedly approved
7 by a (secret)⁵ quorum,” (ECF No. 36 at 5), Plaintiff never states—nor could he—that he did not
8 receive his proxy vote documentation or that he voted against the asset sale.
9

10 **II. Plaintiff’s breach of fiduciary duty allegations fail.**

11 Even if Plaintiff would have made a demand, Plaintiff’s failure to state a cognizable breach
12 of fiduciary duty claim provides a separate and distinct basis to dismiss his claims. As thoroughly
13 briefed in the Scio Defendants’ Principal Brief, NRS §78.138(7) requires a two-step analysis. Under
14 NRS § 78.138(7), Plaintiff must rebut the business judgment rule presumption *and* prove the act or
15 failure to act by the Scio Defendants was a breach of fiduciary duty that “involved intentional
16 misconduct, fraud or a knowing violation of law.” To show “intentional misconduct” or a “knowing
17 violation of law,” a “claimant must establish that the director or officer had knowledge that the
18 alleged *conduct* was wrongful.” *Chur v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 458 P.3d 336,
19 342 (2020) (emphasis added) (dismissing derivative complaint for failing to plead directors knew
20 their conduct was wrongful); *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*,
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24 ⁴ As an example, Plaintiff simultaneously argues both that Scio Defendants failed to preserve Scio’s
25 assets in a trust (including 800,000 shares of Adamas stock and cash) and that Scio Defendants
26 “strip[ped] Scio of its assets.” (ECF No. 36 at 13). Moreover, § 78.175 involves defaulting
27 corporations, which Scio is not.

28 ⁵ Plaintiff’s continuous use of the word “secret” holds no legal meaning, and simply refers to
Plaintiff’s displeasure of Scio Defendants failing to meet Plaintiff’s invented standard for
communication.

1 133 Nev. 369, 375, 399 P.3d 334, 343 (2017). In short—and as further demonstrated below—
 2 Plaintiff failed either to rebut the business judgment rule or establish Scio Defendants engaged in
 3 conduct that they knew to be wrongful. As a result, Plaintiff failed to meet the heightened pleading
 4 requirements under Fed. R. Civ. P. 23.1.

5 Instead of meeting the requirements of *Wynn*, Plaintiff reiterates the same facts he cited to
 6 claim demand futility. Specifically, Plaintiff cites the Adamas Agreement, and alleges that Scio’s
 7 assets were sold to Adamas “in exchange for cash (*in large part* to repay the Individual Defendants’
 8 loans to Scio).” (ECF No. 36 at 19 (emphasis added)). In reality, five directors held \$165,000 of
 9 debt, which was disclosed prior to the vote. (ECF No. 29-3 at 14; ECF No. 29-4 at 5, 9, 10 14, 34).
 10 Plaintiff also cites the amended terms of the Adamas Agreement, under which the 900,000 shares
 11 would be held rather than distributed. (ECF No. 36 at 19.) However, this was also disclosed to
 12 shareholders prior to the vote. (ECF No. 29-3 at 10; ECF No. 29-4 at 5, 10, 14.)

14 Plaintiff also cites the rescheduled vote, followed by an alleged “secret shareholder
 15 meeting,” failing to mention that Plaintiff did not even bother to return his own proxy vote. Plaintiff
 16 also complains of the revocation of Scio’s corporate status, the reduction of 100,000 shares, and the
 17 Scio Defendants’ resignation, ECF No. 36 at 12-13, as proof that the Scio Defendants are not entitled
 18 to the business judgment presumption. But Plaintiff fails to cite a single relevant case or legal
 19 analysis to support this proposition. As Scio Defendants have previously stated, the reduction in
 20 100,000 shares was related to debt held by the landlord and required to save the Adamas Transaction,
 21 which the Scio Defendants had a mandate to do by virtue of the shareholder vote to approve the
 22 transaction. Furthermore, the Scio Defendants’ resignation was the natural result of the transaction.
 23

25 Plaintiff failed to establish that any of the above described innocuous actions were “the
 26 product of fraud of self-interest” or that the Scio Defendants “failed to exercise due care in reaching
 27 the decision.” *Wynn*, 399 P.3d at 343 (internal citations omitted). In short, Plaintiff did not rebut the
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1 business judgment presumption.

2 But even if Plaintiff were able to rebut the business judgment rule, he must satisfy the second
 3 step and demonstrate that the Scio Defendants breached their fiduciary duties *and* that the breaches
 4 involved “intentional misconduct, fraud or a knowing violation of law.” NRS § 78.138(7)(b)(1)-
 5 (2); *Chur*, 458 P.3d at 338; *Wynn*, 399 P.3d at 342. To be clear, gross negligence and “factual
 6 knowledge” are not sufficient to establish liability under NRS § 78.138(7). *Chur*, 458 P.3d at 341-
 7 342. Instead, the Plaintiff is required to show Scio Defendants had “knowledge of wrongfulness”
 8 with regard to their actions or inactions. *Id.* at 342 (citation omitted). The *Chur* Court clarified that
 9 “knowledge of wrongdoing is “an appreciably higher standard than gross negligence.” *Id.*
 10

11 In a fruitless attempt to show Scio’s Defendants’ “intent to harm Scio,” Plaintiff again
 12 regurgitates the same facts, such as the failure to submit SEC filings resulting in the delisting of
 13 Scio stock, delaying the vote and not disclosing the final vote, failure to maintain corporate status,
 14 and reducing the Adamas shares by 100,000 (ECF No. 36 at 20-21). What Plaintiff failed to argue
 15 is more telling than the conclusory arguments Plaintiff made.
 16

17 *Frist*, Plaintiff failed to address or counter any case law or statutes raised by the Scio
 18 Defendants’ in their Principal Brief regarding “intentional misconduct, fraud or a knowing violation
 19 of law.” Apart from two passing references, Plaintiff provides no analysis of *Chur*, the seminal case.
 20

21 *Second*, Plaintiff failed to address case law that states that failure to file SEC filings is a
 22 matter of negligence and not a breach of fiduciary duty. Directors simply do not have a fiduciary
 23 duty to file SEC filings. *Weinfeld v. Minor*, No. 314CV00513RCJWGC, 2016 WL 4487844, at *5
 24 (D. Nev. Aug. 24, 2016) (holding that the failure “to file tax returns or SEC filings” amount to
 25 “matters of negligence” and the business judgment rule prevented claims against defendants for
 26 “failing to make filings with the IRS, SEC, or other agencies...”) Thus, allegations regarding the
 27 registration of the Scio shares revoked for failure to file SEC filings and not informing the
 28

1 shareholders of the same, amounts to *at most* a claim of negligence and is not actionable under the
 2 business judgment rule.

3 *Third*, Plaintiff failed address that while there is a duty to “deal honestly with stockholders,”
 4 in order to breach a fiduciary duty, “the directors must have knowingly disclosed false information,
 5 which “distinguish[s] innocent or negligent disclosure violations from those involving an intent to
 6 mislead stockholders.” *Dohmen v. Goodman*, 234 A.3d 1161, 1168–69 (Del. 2020). Plaintiff does
 7 not dispute that a quorum voted to approve the Adamas Transaction, and fails to make any claim
 8 that the Scio Defendants knowingly disclosed false information related to the Adamas Transaction.
 9 Plaintiff also fails tie the loss of corporate status to a breach of fiduciary duty on the Scio Defendant”
 10 part. The statutes Plaintiff relies on in the SAC—NRS §§ 78.175(5), 78.580(3)—concern dissolved
 11 companies or the assets of a defaulting corporation. (SAC ¶¶ 69, 70, 72). Neither apply to Scio.
 12

13 *Fourth*, Plaintiff fails to cite any case law establishing that forgoing 100,000 shares that
 14 would have otherwise been indefinitely withheld, in order satisfy a creditor is a breach of fiduciary
 15 duty. Plaintiff’s allegation that the Scio Defendants “retroactively reduc[ed] (by 100,000 Adamas
 16 shares) the only component of consideration that was to be paid to Scio for the benefit of, and
 17 distributed to, Scio’s shareholders,” (ECF No. 36 at 20-21) is false. The 100,000 shares were to be
 18 held “indefinitely in order to permit the stockholders to benefit from the business going forward.”
 19 (ECF No. 29-4 at 5).
 20

21 Therefore, even if the Plaintiff were able to rebut the business judgment rule, Nevada law is
 22 clear that the actions Plaintiff complains about are, *at most*, matters of negligence, and are
 23 insufficient to establish liability under NRS § 78.138(7), which requires more than *gross* negligence
 24 and “factual knowledge.” *Chur*, 458 P.3d at 341-342.
 25

26 **III. Plaintiff’s unjust enrichment allegations fail.**

27 Plaintiff’s unjust enrichment claim is based on the same alleged facts as his breach of
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1 fiduciary duty claim and fails for the same reason. The “indefinite” control over the 800,000 (as
 2 later amended) shares was disclosed to the shareholders before the vote, as was Scio’s right to obtain
 3 registration of the Adamas shares. (ECF No. 29-4 at 5, 10, 122). All shareholders had the ability to
 4 vote for or against the Adamas transaction, and the vote was delayed due to discussions with the
 5 SEC. Plaintiff chose to abstain from voting. Scio Defendants’ did not receive anywhere near the
 6 alleged \$3.3 million in cash to repay their individual loans. (ECF No. 29-4 at 34). Rather, contrary
 7 to Plaintiff’s allegations, Scio repaid a total of \$160,000 (not \$3.3 million) in loans to the Scio
 8 Defendants. (*Id.*) Plaintiff’s attempt to mislead the Court on the amount of the Scio Defendants’
 9 individual loans demonstrates that an honest recitation of the facts is not favorable to Plaintiff.
 10 Plaintiff’s unjust enrichment allegations fail as a matter of law.

12 **IV. Plaintiff fails to show a stay is appropriate.**

13 In a half-hearted attempt to stave off a dismissal, Plaintiff requests a stay of this litigation so
 14 a receiver can be appointed. But Plaintiff makes no showing that a receivership is appropriate under
 15 Nevada law. The factors to be considered when evaluating a request for a stay are “[a] party seeking
 16 a stay must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
 17 harm in the absence of relief, that the balance of equities tip in his favor, and that a stay is in the
 18 public interest.” *Humane Soc’y of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). Plaintiff
 19 fails to establish any of these factors.

21 The cases cited by Plaintiff—*Nishon’s Inc. v. Kendigian*, 538 P.2d 580, 581 (Nev. 1975) and
 22 *Peri-Gil Corp. v. Sutton*, 442 P.2d 35, 37 (Nev. 1968)—involved the proper appointment or a
 23 receiver under NRS § 78.650, a statute that is absent from Plaintiff’s argument that he would succeed
 24 on a motion to appoint a receiver. As a threshold requirement, § 78.650(1) requires that the request
 25 for appointment of a receiver be made by “any holder or holders of one-tenth of the issued and
 26 outstanding stock . . .” Plaintiff does not hold 1/10 issued Scio stock. He does not assert that he does.
 27
 28

1 On that basis alone, Plaintiff’s assertion that he is likely to succeed on the merits of a motion to
 2 appoint a receiver fails. Moreover, Plaintiff’s claim that he will succeed on the merits of his SAC
 3 fail because he has not alleged viable claims against the Scio Defendants. The failure to establish
 4 that Plaintiff is likely to succeed on the merits is dispositive. *Humane Soc. of U.S.* 558 F.3d at 897
 5 (“[W]e conclude that appellants have not met their burden of demonstrating a likelihood of success
 6 on the merits. They therefore fail to meet the threshold for a stay pending appeal.”)

7
 8 The claimed irreparable harm alleged to be suffered if a stay is not granted and “if the Court
 9 were to conclude that the Individual Defendants were entitled to take advantage of a technicality
 10 under Rule 23.1”⁶ would be a dismissal of the suit. Any harm resulting from the Plaintiff’s failure
 11 to make a pre-suit demand or otherwise fail to state a claim, is self-imposed. Staying the current
 12 litigation in order for a motion or application for a receiver—which has yet to be filed—is against
 13 public policy favoring expeditious resolution of litigation and is fundamentally unfair to Scio
 14 Defendants, particularly because Plaintiff has presented false allegations which have caused
 15 unnecessary delay and that have needlessly increased the cost of litigation. The balance of equities
 16 is not in Plaintiff’s favor and his request for a stay should be denied.

18 CONCLUSION

19 The Plaintiff fails to satisfy the requirements for pleading demand futility and fails to satisfy
 20 the substantive elements of breach of fiduciary duty and unjust enrichment. Plaintiff’s presentation
 21 of false allegations and failure to address the controlling case law have resulted in needless litigation
 22 and unnecessary costs. Plaintiff lacks standing to bring derivative claims, and this case should be
 23 dismissed with prejudice.

24
 25
 26 ⁶ Complying with Rule 23.1, “is not merely a technical or unimportant requirement . . . strict
 27 compliance with Rule 23.1 and the applicable substantive law is necessary . . .” *Potter v. Hughes*,
 28 546 F.3d 1051, 1058 (9th Cir. 2008).

1 Respectfully submitted this 21st day of June, 2023

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3 **SPENCER FANE LLP**

4
5 Mary E. Bacon (NV Bar No. 12686)
6 300 S. Fourth Street, Suite 950
7 Las Vegas, NV 89101

8 and

9 **BEST & FLANAGAN LLP**

10 By: /s/ John A. Sullivan

11 Amy S. Conners

12 John A. Sullivan

13 Brian Linnerooth

14 60 South Sixth Street, Suite 2700

15 Minneapolis, Minnesota 55402

16 Telephone: (612) 339-7121

17 Facsimile: (612) 339-5897

18 *Attorneys for Defendants Bernard*

19 *McPheely, Karl Leaverton, Gerald*

20 *McGuire and Lewis Smoak*